

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
SAN FRANCISCO, CALIFORNIA

**SUMMIT HEALTHCARE ASSOCIATION d/b/a
SUMMIT REGIONAL MEDICAL CENTER**

and

Case 28–CA–22308

KELLY BUNTON, an Individual

William Mabry III, Phoenix, Arizona, for the General
Counsel.

Amy J. Gittler and **Jeffrey W. Toppel** (with **George X.
Cherpelis** on brief), of **Jackson, Lewis, LLP**, Phoenix,
Arizona, for Respondent.

DECISION

Statement of the Case

JAMES M. KENNEDY, Administrative Law Judge: This case was tried in Show Low, Arizona on June 23-25, 2009, based upon a complaint issued on March 31, 2009 by the Regional Director for Region 28. The complaint is based upon an unfair labor practice charge filed on January 9, 2009 by Kelly Bunton, an Individual (Bunton or the Charging Party). The complaint alleges that Summit Healthcare Association, d/b/a Summit Regional Medical Center (Respondent or the Hospital), committed certain violations of §8(a)(1) of the National Labor Relations Act. Respondent denies the allegations in their entirety. All parties have filed post-hearing briefs and they have been carefully considered.

Issues

The principal issue is whether Respondent discharged Bunton on December 10, 2008 for reasons prohibited by §8(a)(1) of the Act. The complaint also alleges some lesser, independent violations of §8(a)(1). More specifically, the General Counsel asserts that Respondent discharged the Charging Party, a registered nurse, because she had engaged in the protected concerted activity, defined by §7 of the Act, of discussing wages with her fellow employees, contrary to a rule which supposedly prohibited employees from doing that. Indeed, the General Counsel also asserts that one of the two reasons which Respondent assigned for the discharge – that she had concertedly tried to get Respondent to correct some shortcomings relating to patient dietary orders – was also protected. Indeed, it asserts that the other proffered

reason – alleged rude and abusive behavior directed to a dietary department employee – was contrived and untrue, suggesting that the real reason was a reprisal for Bunton’s involvement in one or both of the protected activities. ¹

5 Respondent denies that it discharged Bunton as retaliation for her protected conduct. Moreover, it asserts that Bunton did not participate in any activity protected by §7, averring that it discharged her for endangering patients by urging another nurse to perform work outside the scope of practice, and because she in fact had been verbally abusive to the dietary staffer.

10 Both the General Counsel and Respondent have filed briefs which have been carefully considered. Thereafter, Respondent moved to strike portions of the General Counsel’s brief as inaccurate descriptions of the facts as developed during the hearing and, therefore, not supported by the record. I advised the parties that I would address the motion in this decision. While there is a certain merit to the motion, the shortcomings of the General Counsel’s theory
15 will subsume most, if not all, of the issues raised in the motion. Accordingly, the matters will be covered in the discussion of the complaint’s merits.

 Based upon the entire record, including my observation of the demeanor of the witnesses, I make the following

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Findings of Fact

I. Jurisdiction

25 Respondent admits it has been at material times an Arizona corporation operating a hospital in Show Low, Arizona, where it provides both inpatient and outpatient medical care. It therefore admits that it meets the definition of a health care institution as set forth in §2(14) of the Act. It further admits that during the year preceding the issuance of the complaint, in the operation of its business, Respondent’s gross revenues exceeded \$250,000 and during the
30 same time frame it purchased goods from directly outside Arizona valued in excess of \$50,000. Accordingly, it admits that it meets the Board’s jurisdictional standard for hospitals engaged in commerce within the meaning of §2(5), (6) and (7) of the Act.

Background

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 Kelly Bunton is a registered nurse who, until her discharge on December 10, 2008, ² had worked for Respondent since 2003. Her immediate supervisors during 2008 were Jayne Simms, the director of the medical-surgical department and Diana Anderson, the assistant director of that department. Simms, with Anderson’s concurrence, is the individual who
40 determined that Bunton should be discharged. Others involved in the approval process were Correen Bales, the director of the human resources department and Robin Conklin, the vice-president for patient care services. Syble Hartley, the director of the dietary department and her assistant, Karla Hoffert, provided information which contributed to the decision.

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¹ In addition, the complaint cites other, supposedly protected, concerted acts – complaints about equipment failures, the method of assigning patients and “other matters” related to wages, hours and working conditions. The General Counsel did not support any of these with evidence indicative of a violation.

² All dates are 2008 unless stated otherwise.

In October 2006, Thomas D. Plantz became the chief operating officer of the Hospital. At some point, he determined that the pay and salary structure needed to be modified. The change took several months to formulate and it was not implemented until April 2008. Respondent undertook a large-scale explanatory campaign in order to educate the staff concerning what was happening and how the calculations were to be made. Essentially, the changeover implemented a pay for performance program, replacing a program which had placed more value on experience. Employees were urged to ask questions about the program and told that they could discuss it privately with the human resources staff. The new structure meant a change in the employee evaluation criteria, and Respondent undertook to educate the staff concerning how future evaluations would be used for pay raises.

At the same time, a wage survey was conducted and a formula established to make certain that the staff was being properly paid for purposes of establishing a correct baseline on which to build the new merit pay system. The testimony was that no employee's pay was reduced in this process, though some upward adjustments were made. As with the system itself, Respondent tried to explain what was happening and why adjustments occurred. Some of Respondent's educational efforts are described in the June 2008 edition of its newsletter to the staff.

In addition, there is no evidence, under either the previous system or the new system, that there was any rule which prohibited employees from discussing wages with one another. Certainly no written rule has been shown, and human resources director Coreen Bales has testified (corroborated by others) that there is no such rule. There is some evidence that the CEO who preceded Plantz was perhaps more protective of such information, but even so it never amounted to a prohibition. There is no evidence that any employee has ever been disciplined for speaking to colleagues about each other's level of remuneration, and Bales denies it has ever occurred.

Kelly Bunton

The Charging Party, Kelly Bunton, does not accept her managers' testimony that rules against talking about wages are non-existent – at least insofar as oral instructions are concerned. She testified that sometime in July she and perhaps four other nurses had a discussion at the nurses station on her floor. She gave the following testimony:

Q [By Mr. MABRY] Okay. Now during your employment with the Respondent, have you ever had the occasion to discuss wages with other employees?

A [Witness BUNTON] Yes.

Q When did you do that?

A Sometime this last July, July '08.

Q And how did that come about?

A They had issued across the board the new policy of how we were being paid by the different standards evaluations was not -- had not really taken effect yet. It was in place, but they hadn't been using it. And they had given across the board wage increase increases to various people. And we were trying to decide -- it was myself and several other nurses. We were trying to decide how they came up with some of those figures and stuff.

Q Now where did these -- where did this conversation take place? Was it one conversation?

A Yeah, it was one conversation. It was in the nurses' station on the first floor.

Q And how many nurses were involved?

A It was probably three or four of us at least. It was a very quiet conversation.

Bunton then testified:

Q Now do you know if management ever was aware of your discussion of wages?

A I became aware a couple of weeks later when Jayne Simms called me into her office regarding that conversation.

Q And did she advise you as to why you were coming into her office?

A When I got in there she said that she understood that there had been a conversation regarding wages and I was a participant and did I know or I knew it was against policy and was -- I could be terminated immediately for it.

Q Who was present in the office with you and Ms. Simms?

A Nobody. It was just Jayne and I.

Q Now, did you say anything in response to this?

A I said, "Well, I wasn't talking about specific like, you know, specific. We were just wondering how the figures were reached."

Q And did she have anything in response?

A Just that it was a warning that we were not to discuss wages.

Simms denies that this conversation ever occurred. Certainly no one was present who could corroborate it. Even so, if Bunton is credited, it would not establish that Respondent had a "rule" against employees discussing salaries among themselves. It would only establish that Simms told Bunton that she could not have such discussions. As the Board observed in *Hotel Roanoke*, 293 NLRB 182, 189 (1989) an employer who told a food service worker that she could "talk about the veal and the lemon sauce, but not the union," was not the promulgation of a rule. Nevertheless, it found the comment itself coercive. See also *American Thread Co.*, 270 NLRB 526, 528 (1984).

In support of Bunton's testimony that Simms made the remark, and that it was consistent with what Respondent had told others, the General Counsel called two other witnesses, Lura Gorman and Dana Crandell, both RN's who worked with Bunton. Gorman, one of Bunton's best friends, testified that employees had been "encouraged not to talk about our wages." She did not say who had done that or when it had occurred.

Crandell testified:

Q BY MR. MABRY: According to you, are you aware of the -- is there a policy at Summit that talks about whether employees can discuss their wages?

A [Witness CRANDELL] I don't know if there's a policy, but I do know that it's been mentioned that we weren't supposed to discuss wages with other RNs.

Q And who --

A Or other staff.

Q Or other staff? And who advised you of that?

A I don't remember a certain person. I don't know if I heard it through other nurses or if it was at a staff meeting. I don't remember. I just remember hearing that, that we weren't supposed to discuss our wages with others.

Like Gorman, Crandell was unable to say who had made such a statement or when. Indeed, she seems to think she may have heard it from other nurses rather than a manager. Certainly Simms is absent from the testimony of both of these supposedly corroborative witnesses.

During the same time frame, recorded by vice-president Robin Conklin and a follow-up e-mail to Bunton, Bunton had gone to Conklin in the belief that Gorman, under the new salary structure, was now making more than she was. How Bunton had come to that conclusion is not reflected in the record — perhaps from the nursing station discussion? Nevertheless, Conklin
 5 checked into the request and advised Simms of the results. In turn, Simms on September 26, e-mailed Bunton to advise that “[Conklin] researched the situation with HR and it was found that [Gorman] is not making a higher wage than you. You actually make more than she does”

At a minimum, this e-mail tends to corroborate Respondent’s contention that there is no
 10 policy or practice which would bar employees from speaking to each other about their wages. It had reason to conclude that whatever information that had come to Bunton, it had come from an employee source. Yet its response, via Simms, was helpful and benign. It fully answered the inquiry and the answer was consistent with its effort to educate staff about the actual impact of the wage structure modification. It suggests a preferred choice of openness over wage matters,
 15 rather than suppression. It also suggests that Bunton had asked a question which was not so much concerned with the wage system as it might be applied to employees in general, but instead applied exclusively to her own pay rate. Her concern here was not concerted, but personal.

20 Why, then, would Bunton have testified to a separate conversation with Simms which accused her of making a coercive statement aimed at keeping wage matters confidential?

A look at Bunton’s record over the year yields at least some reasons. In February, Bunton had undergone her annual appraisal. She had been given the opportunity to assess
 25 herself and had given herself high marks in all of the categories. She was stunned to discover that Simms strongly disagreed with her, so much so as to warrant imposing a ‘final warning.’ Indeed, the final warning status required her to complete an action plan (a corrective action plan) in order to improve her performance. It was due March 7. Bunton, claiming to have misunderstood, says she thought the action plan was only a suggestion. Her explanation
 30 makes little sense. Employee action plans, such as this, in the face of a final warning cannot be viewed as a suggestion — it was mandatory, and she knew it. She just wanted to avoid it. Now, it should be observed here that the shortcomings which Simms (and her assistant Anderson) had perceived and recorded in her February 20 warning — aside from some minor incident reports — were not aimed at her capabilities as a nurse, but at her lack of a
 35 professional demeanor.³ She was reported as engaging in excessive socializing, being too loud, using inappropriate/foul language and having unprofessional conversations in public places. It all added up to her failure to maintain a professional demeanor.

Respondent allowed her until May 7 to complete the action plan. As finally submitted
 40 and approved, it covered two issues: Talking too much and talking too loudly. For the first, she agreed 1. To think first..., 2. chat away from the crowd, 3. take her prescribed meds, and 4. enlist the help of key persons to let her know when she was “runn[ing] away at the mouth.” For the second, she agreed 1. to practice using a soft voice, not only at work but at home, 2. to try to stay calm inside (take meds) so voice doesn’t sound excited and loud, and 3. to enlist the
 45 help of soft-spoken persons at work.

³ This is not to suggest that Bunton’s nursing capabilities were perfect. The record reflects a number of incidents which, rightly or wrongly, had caught the attention of supervision and were sufficiently remarkable so as to be recorded. (At least one of these may have been recorded by the health unit clerk who may have misunderstood what was transpiring.) It is not necessary to describe this aspect of the case in any detail.

The negative appraisal and the required action plan did not sit well with Bunton. Nevertheless, over the next few months she was observed to have improved herself as required. Anderson noted that Bunton had improved sufficiently in August and suggested that Bunton be permitted to train a ‘capstone’ nursing student,⁴ persuading Simms to go along. 5 Simms acknowledged that improvement. However, by mid-October, as the student’s training came to an end, Anderson observed that Bunton was returning to her ‘old habits of non-stop talking.’ This led to an October 14 meeting with Bunton on the point.

Those action plan restrictions are obviously at odds with her personality. Indeed, as I 10 observed Bunton’s demeanor during the hearing, I could see she had difficulty restraining her naturally loquacious and gregarious nature and was unduly fidgety. At the small table where the parties and I were seated, she often nodded and shook her head as she agreed or disagreed with what was being said, whether by counsel or by a witness. I had to admonish her at least twice. And, outside the hearing room, her nature led her to being misunderstood as having 15 offered a witness a bribe of a trip to Disneyland.

The point here is that Bunton has a high opinion of herself, allowing her to do or say things, yet unaware of the impact those remarks have on others, because essentially she believes she is saying or doing harmless things. From her point of view, the negative appraisal 20 was unjust and the people involved, particularly Simms, were being unfair. To me, that resentfulness is a reason to reject her credibility concerning the conversation where she says Simms told her not to discuss wages with other employees.

However, there is more than just the issue of a ban on discussing wages. There is the 25 question of whether having the conversation she described with fellow employees over wages is conduct protected by §7 and the connected question of whether that contributed to her discharge. Those questions will be further explored in the analysis section below.

But first, I recount the incidents leading to the discharge.

30 The Diet Order Issue

According to Bunton, there has been an ongoing, if infrequent, issue with physicians who occasionally neglect to provide a diet order for newly admitted patients. There is no 35 disagreement that patients may not be treated without a doctor’s order – and that includes diet orders, since some patients may be denied food for certain conditions or their diet may be restricted for other conditions. It is all part of the treatment plan. Lack of a diet order means that the patient cannot be permitted to eat. When that occurs, the nurse in charge of that patient must contact the attending physician and obtain the diet order. The doctor either fills out 40 the order or verbally provides it to the nurse, but signs off on it later. That order is then placed into the hospital’s computer system by the health unit coordinator where it becomes available to the staff, particularly the dietary department (kitchen staff), which needs to know what diet it needs to prepare for that patient.

According to Bunton, as far back as 2004 or 2005 (“probably three and a half, four years 45 ago...”), she had circulated a petition aimed at the issue of diet orders. Aside from her testimony – which really speaks to opposing some sort of policy change, rather than doctors forgetting to write them – there is no definitive evidence concerning what she intended to

⁴ A “capstone” student nurse is one who is entering the final weeks of in-hospital training prior to graduating from nursing school.

accomplish. Indeed, she seems to be the only person who recalls it at all, and her testimony leaves the matter unclarified. Then she testified haltingly about expressing her concerns on the subject in 2008.

5 Q [By Mr. MABRY] Have you ever had a discussion with management concerning dietary orders?

A [Witness BUNTON] I'm not sure.

Q The lack of diet orders being in a patient's chart.

A Yeah.

10 Q When did you have these conversations?

A I can't recall when those were, sometime in 2008. It's been an ongoing thing.

Q What particular concern did you have concerning diet orders?

A Just lots of times the patient would be there a long time and we couldn't get a diet order because you couldn't get a hold of the physician, so the patient would be there with no food.

15 Q Do you recall a particular management member that you raised this issue with?

A It was raised with Diana.

Q Anderson?

A Uh-huh. [affirmative]

20 Q Do you recall when?

A I don't.

Q Was it in 2008?

A Yes, I believe so.

25 It can readily be seen from this testimony that Bunton does not really have any specific conversation in mind. At best she can only recall one conversation with her immediate supervisor about the problem. She does not tie the matter to any concerted or mutual employee concern. Even so, she does not go on to describe what Anderson's response, if any, actually was. Bunton's testimony here is most vague.

30 With that background, I turn first to the Overstreet matter and then to the Nurses Station incident.

35 Overstreet. Jody Overstreet is the PM assistant (afternoon, evening) who handles orders for the kitchen. Her lead person is diet clerk Jackie Moeller and the first line supervisor is Karla Hoffert. All report to diet department head Syble Hartley; Hoffert serves as Hartley's principal assistant.

40 Shortly before 5:30 p.m., on December 2, one of Bunton's patients returned to the ward after undergoing testing for a lengthy period during the day. Until his return, the patient had been unable to eat and was now hungry. At 5:30, Bunton called the kitchen to order some food for him; Overstreet answered the call. Following procedure, Overstreet checked the computer to confirm the doctor's diet order. For some reason, never explained, the order was missing from the computer. This was odd, because the patient had previously had an order on file. In
45 any event, Overstreet told Bunton that she could not find the order.

This resulted in a roughly 20 minute standoff regarding what to do next. There is no real need to describe it, for the merits are unimportant here and eventually the order was found. What is significant here is that Overstreet testified as follows:

Q [By Mr. MABRY] There's been testimony regarding the conversation between you and Ms. Bunton. Do you recall a conversation some time in the first week of December?

A [Witness OVERSTREET] Yes.

Q There has been some testimony that Ms. Bunton was rude and disrespectful and abusive to you. Is that true?

A No.

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The incident nonetheless upset Overstreet, not because of anything that Bunton had done, but because the whole thing was so frustrating. In fact, she essentially pointed at one of the 'runners' (runners are kitchen employees who deliver trays to the rooms): "...[H]ow I recalled it was that our runner at the time, he was fairly new and he came back to the kitchen, you know, really upset about a tray for a patient, that he wasn't getting it yet. And I was trying to explain to him how I can't send a tray out unless I have the diet order. And he wasn't understanding, you know, that I can't send it out. He's saying, you know, the patient's hungry, he wants his food. And I kept trying to explain to him that he can't -- I can't send that tray out until I get the diet order."

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But, Overstreet, unnecessarily distraught, reported the matter to Moeller the next day. Moeller says she got a note from Overstreet. Overstreet was not asked if she left a note for Moeller, but if so, it has now been lost. Moeller, in turn, reported the matter to Hoffert who then informed Hartley. Unfortunately, Overstreet is simply not very good at explaining things, and somehow blame for the matter fell upon Bunton. This was nothing more than a child's game of 'Telephone' where no one thought to question Overstreet very thoroughly.⁵ Overstreet's distress was escalated by the non-witnesses into a belief that Bunton had treated Overstreet rudely and with disrespect. Yet, as Hoffert says in the quote set forth in the footnote, Overstreet never said that Bunton yelled at her -- but only 'almost' did so. It seems to me that there is a great likelihood that Hoffert is now backfilling her failure to initially get it right; she even denies a runner was involved, a fact she had entirely missed. In any event, I must credit Overstreet's testimony that Bunton was never rude or disrespectful to her. Overstreet was the percipient witness, even if she has descriptive shortcomings of her own. She knew it best.

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Armed with this misinformation, Hartley decided to take the matter up with Simms and did so at a December 4 meeting between herself, accompanied by Hoffert, and Simms, joined by Anderson. Simms, well aware of Bunton's history, became dismayed, to say the least, and agreed to investigate Hartley's complaint about Bunton. She did not do so because of what happened next.

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⁵ Hoffert did speak to Overstreet. She testified: "Okay. She told me the previous night she got a call from Kelly, who needed a diet for a patient. We did not have a diet order in the computer on this patient. And Jody told Kelly that we could not send a diet unless we had a diet order through the computer. Or a hard copy, and that would be the -- coming to the kitchen and handing us a diet order. And she said it went on that way for probably 20 minutes or so, and -- *** And it went on for maybe 20 minutes, and it was done. And a diet order came through probably -- she doesn't know when the diet order came through at that time. She said she was upset. When she told me, she was upset, she was almost crying to me. When she told me. *** She was very upset. She just looked like she was just going to cry on me. She was very upset. *** She said that Kelly was rude. *** That Kelly was almost yelling at her."

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The Nurses Station Incident. The following morning, December 5, at 7:30 a.m., Bunton, fellow nurse Dana Crandell and Dr. Michael Foote ⁶ were all at the nurses station. That morning a training official, an attorney-nurse named Kim Kent, had come to the Hospital to offer in-service training concerning proper charting by nurses. Having had no takers, she and Anderson had joined the group at the nurses station. Bunton, at least, knew who Kent was and what she was visiting for.

Crandell was reviewing a patient's chart and had been unable to find a diet order from the patient's doctor (not Dr. Foote). She asked Bunton to help her look for one. When both continued to come up empty, Bunton decided to try some droll humor, which as I note, was never understood. She was acutely aware of the Hospital's problem concerning doctors forgetting to place diet orders, so she decided to act it out for Kent's benefit and possibly for Anderson's discomfort.

In an ill-conceived manner, Bunton made a show of asking Crandell what the patient's illness was. Crandell, not aware of Bunton's purpose, replied "pneumonia." Maintaining her tone, Bunton said, depending on which witness one asks, either "Oh, just give him anything he wants to eat. Just give him whatever" or "Just give him a regular diet."

That remark set off alarm bells, though they weren't the bells Bunton expected. As noted above, nurses cannot issue treatment orders themselves. Everyone at the station knew it, including Bunton. Crandell, busy with hunting down the order, was already arranging to track down the doctor and paid no attention. Foote is said to have chuckled and Anderson, because of Kent's presence, says she was mortified because this was exactly the type of charting which Kent had been brought in to counsel against. Moreover, she was already suspicious of Bunton due to some earlier events and because of the complaint she had heard from Hartley the day before.

In addition, neither Anderson nor Simms brooks any nonsense from the professionals who report to them. Both have military nursing backgrounds. And, both take their professional responsibilities extremely seriously. ⁷ Droll humor in their workplace is not likely to be appreciated, particularly if it is aimed at professional rules. Based on their training and the culture they wish to present, in their view, false drama is out of place in the nursing profession, particularly on a ward. They don't expect it and are likely to take it at face value.

Embarrassed, Anderson disguised her feeling and sought to use the incident as a training vehicle. She asked those present to do some role playing about nurses who overreach their authority. Despite her outward equanimity, Anderson was furious over Bunton's seeming exhortation to Crandell and took it seriously. Shortly thereafter, Anderson reported the incident to Simms. Simms accepted Anderson's verbal and follow-up written report to the effect that Bunton had told Crandell to write a diet order, and had thereby exceeded the scope of practice. She decided that enough was enough.

⁶ Dr. Foote was supposedly subpoenaed by the General Counsel. Whether service was ever perfected on him is unclear, nor is there any suggestion that a pre-trial effort to contact him had been made. He is said to have been out of the state during the hearing and he did not appear.

⁷ Both have advanced degrees in nursing and/or health administration.

Combined with the diet department complaint, Simms concluded the situation had reached the level where it had become necessary to fire Bunton. Simms immediately began the preparatory steps to fire Bunton. That procedure took a few days, as she needed to review and marshal incidents from the past year, and because she needed the approval of HR's Bales and CEO Plantz. There was no dissent to her recommendation and on December 10, Bales and Simms informed Bunton that she was discharged.

Analysis and Conclusions

On the foregoing facts, I am unable to find that the Act has been violated as alleged in the complaint. The complaint's primary theory is that Bunton was discharged because she spoke to fellow employees about wages, in breach of an illegal Hospital rule. In any event, the General Counsel asserts her conduct should be deemed protected by law as at least a preliminary step toward the concerted act leading to the mutual protection of employees. See, e.g., *Whittaker Corp.*, 289 NLRB 933 (1988). While I have no problem with the legal concept in the abstract, the facts do not support it here.

First, it is clear that Respondent maintained no such rule. It was not against Hospital policy for employees to speak to each other about either their own wages or the newly installed remuneration structure. Indeed, the evidence shows that the Hospital encouraged such discussions, as it believed the better it was understood, the better the employees would perform. Second, I cannot credit Bunton's version of the July or early August admonition supposedly given to her by Simms. Not only is it uncorroborated, it simply does not make sense in the circumstances. Both Conklin and Simms, apparently following Plantz' policy, were unoffended by Bunton's own wage inquiry as Bunton herself reported. Accordingly, I find the allegation has not been proven.

Connected to that are the complaint allegations arising out of that same Bunton-Simms conversation asserting that what Simms said qualifies as both an unlawful threat and an unlawful impression that Bunton's protected conduct was under surveillance. Since I find the conversation did not occur as Bunton described, it follows that there can be no proof of any independent §8(a)(1) threats or impressions of surveillance arising from it. The only credited conversation Bunton had with a manager over wages was her inquiry to Conklin about her own situation. That was not a concerted act, nor was it aimed at the mutual aid or protection of her fellow employees. It was entirely personal.

Third, even if one were to credit Bunton's version, it does not follow that she was discharged for her efforts. She was operating under a last warning for shortcomings concerning her professional demeanor. The two incidents which occurred in early December both involved a failure to comply with her promise to present a professional demeanor. The Overstreet matter was entirely beyond her control and was essentially based on information we now know to have been inaccurate, as it was based on a serious mistake by Hartley and her staff. Yet, Hartley's complaint had nothing to do with any putative protected conduct by Bunton. Hartley was only protecting her own staff from what she thought was unwarranted abuse, behavior for which Bunton already had a poor reputation. Fourth, Bunton has only herself to blame for the misunderstood silliness at the nursing station, where she provided Anderson with proof that she had not kept the promise she had made in her corrective action plan. If Anderson did not understand Bunton was playing a game, it is hardly Anderson's fault.

Finally, the alternate theory, that Bunton was engaged in protected, concerted conduct when she complained (actually play-acted) in front other employees about physicians' common failure to provide diet orders for their patients, does not hold water as a matter of law. Although

nurses are free to band together for their own mutual aid and protection, that does not mean the Act frees them to band together for the protection of their patients. Section 7 does not speak to employee-patient or employee-customer connections. It speaks of the mutual protection of employees. In pertinent part, it says “Employees shall have the right ... to engage in []

5 concerted activities for the purpose of collective bargaining or other mutual aid or protection. . . .” The word “mutual” refers to employees, not anyone else. See *Autumn Manor*, 268 NLRB 239, 243 (1983). There, the Board adopted my statement holding “If the proper test is that which is cited in *G & W Electric Specialty*⁸—that is, the interest must be employee *qua* employee,^[note omitted] Hill and Broz’s situations fall short. They were not engaged in employee *qua* employee conduct but in employee *qua* patient conduct.” The Board upheld the dismissal of

10 that portion of the case. See also *Waters of Orchard Park*, 341 NLRB 642 (2004).

Indeed, the Board’s language in *Waters of Orchard Park* is very pointed on this question. See 341 NLRB 642 at 644 where it said:

15 The Board has held repeatedly that employee concerns for the “quality of care” and the “welfare” of their patients are not interests “encompassed by the ‘mutual aid or protection’ clause.” *Lutheran Social Service of Minnesota*, 250 NLRB 35, 42 (1980) (concerted activity of employees of a home for troubled youth who complained about planned policy changes found unprotected, where the employees were found to be disturbed by decisions by

20 management and a “perceived lack of competency of management which, in their view, threatened the ‘quality of care,’ ‘the quality of the program,’ and the ‘welfare of the children’”) See also *Good Samaritan Hospital & Health Center*, 265 NLRB 618, 626 (1982) (concerted activity of hospital’s occupational therapists who complained about the management of the hospital’s developmental learning program found unprotected, where the therapists were

25 concerned with the “quality of the care offered by the program and the welfare of the children”) Complaints motivated by concerns for “residents’ living conditions” have also been found to be “not directly related to the employees’ working conditions.” *Damon House*, 270 NLRB 143, 143 (1984) (concerted activity of counselors at a drug treatment center found

30 unprotected, where counselors sent a letter attacking the center’s executive director and his impact on the adolescent residents).

See also *Tradesmen International v. NLRB*, 275 F.3d 1137 (D.C. Cir. 2002) (same, but concerning construction industry employees).⁹

⁸ *G & W Electric Specialty Co.*, 154 NLRB 1136 (1965) (Member Jenkins dissenting), enf. denied 360 F.2d 873 (7th Cir. 1966).

⁹ The court in *Tradesmen* said: “But the “mutual aid or protection” clause is not without bound. That is, an employee’s activity will fall outside section 7’s protective reach if it fails in some manner to relate to “legitimate employee concerns about employment-related matters.” *Kysor/Cadillac*, 309 NLRB 237, 237 n. 3 (1992); see *Eastex*, 437 U.S. at 567-68. Thus an essential element before section 7’s protections attach is a nexus between one’s allegedly protected activity and “employees’ interests as employees.” *Eastex*, 437 U.S. at 567. *** Here,

40 however, the bonding requirement is not a “union standard.” It applied to all subcontractors, whether they employed union workers, non-union workers, or both. Moreover, in the traditional area-standards picketing scenario, benefits flow to both union and non-union employees. When effective, union employees receive increased job security and non-union employees receive, for example, increased employee benefits, or at least that is the theory, and a plausible outcome in many cases. In the present case, Oakes’s activity was not an effort to improve any employees’ (union or non-union) working conditions. So far as the record shows, it was solely an effort to

Continued

It is conceivable under *G & W Electric*'s logic that some employee conduct could be "close enough in kind and character, and bear[] such a reasonable connection to matters affecting the interest of employees *qua* employees, as to come within the general reach of the 'mutual aid and protection' the statute is concerned to protect." However, the connection cannot be tenuous; it must be evident from the circumstances. For example, it is close to self-evident that employee staffing at a health care institution can affect the workload of other healthcare employees. See, e.g., *Damon House*, 270 NLRB 143 (1984) and *Reading Hospital*, 226 NLRB 611 (1976). In those cases the Board did find that §7's 'mutual aid and protection' language had application because of the relationship of staffing to workload.

Nevertheless, here the General Counsel's diet order argument is entirely unpersuasive. There is certainly no record evidence that lack of diet orders would redound to the nurse assigned to the complaining patient. Furthermore, the evidence contradicts the contention. Nurses are not responsible for a doctor's failure to provide a diet order, and if a patient were to make such a complaint against the nurse, Respondent's own rules (as well as limits imposed by state practice rules) could not hold it against the nurse. Nurses have no authority to order a diet, so how could such a complaint legitimately fall upon the nurse, much less find its way into the nurse's annual appraisal? It just won't happen. Even the Charging Party said she had received no such complaint nor did she have knowledge of any directed to any other nurse. Therefore, the General Counsel's argument here goes beyond speculation and into the realm of the inconceivable. Accordingly, it is rejected.

I think it is fair to say that Bunton was not guilty of at least some of what Respondent suspected. Yet her conduct never was within the sphere of the protection of §7 of the Act. The Board has long held that an employee may be dismissed for any reason, or no reason at all, so long as the employee's §7 activity is not the basis for the discharge. *Lawson Milk Co. v. NLRB*, 317 F.2d 756, 760 (6th Cir. 1963); *Auto-Truck Federal Credit Union*, 232 NLRB 1024, 1027 (1977). The fact that Respondent failed to accurately assess what transgressions Bunton had or had not committed is not of any concern to the Board so long as activity protected by §7 is not implicated. Here the General Counsel's proof is woefully short of showing that Bunton ever did anything falling within the ambit of the Act.

Finally, the complaint makes some independent §8(a)(1) allegations relating to December 10, the day of Bunton's discharge. A review of the record reveals no sign of any facts supporting the allegations. Presumably those facts would have occurred during Bunton's exit interview in Bales' office. Yet Bunton supplied nothing in support when describing that meeting. Accordingly, those allegations stand unproven. The complaint should be dismissed.

Based on the foregoing findings, I hereby make the following

Conclusions of Law

1. Respondent is an employer engaged in commerce within the meaning of §2(2), (6) and (7) and a health care institution as defined by §2(14) of the Act.

raise Tradesmen's costs. Paying the bond would not place Tradesmen on a more level playing field with union companies, it would instead subject leasing companies to one discreet element of construction costs required of contractors and subcontractors, regardless of whether either the leasing companies or contractors employed union or non-union employees. Moreover, neither the Board nor the intervening union has suggested any meaningful sense in which the bond related to employees' interests as employees."

2. The General Counsel has failed to demonstrate by that Respondent committed any of the unfair labor practices alleged.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended ¹⁰

ORDER

The complaint is dismissed in its entirety. ¹¹

James M. Kennedy
Administrative Law Judge

Dated, Washington, D.C. February 4, 2010

¹⁰ If no exceptions are filed as provided by §102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in §102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

¹¹ Respondent's motion to strike portions of the General Counsel's brief has been rendered moot by this order.